No. 06-345

In the Supreme Court of the United States

DOROTHEA DARAIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in admitting, under Federal Rule of Evidence 404(b), evidence of petitioner's prior non-compliance with the tax laws.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 445 F.3d 253.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2006. On June 30, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including September 7, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operated Quest Investigators (Quest), a business nominally owned by her husband. Quest provided private security to businesses in and around Camden County, New Jersey. Like other employers, Quest

was required to collect its employees' individual income tax withholdings and pay those withholdings, as well as various payroll taxes such as Social Security and Medicare, to the Internal Revenue Service (IRS). Quest did not make all of its required payments, and by 1993 it accumulated more than $600,000 in back taxes and penalties. Shortly after the IRS filed a series of levies with Quest's customers, Quest ceased operations and was succeeded in early 1994 by Eagle Security, Inc. (Eagle), which was owned and operated by petitioner. Gov't C.A. Br. 4-5.

Between April 1994 and April 1998, Eagle paid taxes only sporadically. The IRS began efforts to collect those unpaid taxes in May 1995 by filing tax liens against the corporation. On October 1, 1997, the IRS served on petitioner a summons demanding information concerning Eagle's accounts receivable. The IRS then filed levies, dated December 1, 1997, with the customers that petitioner had identified in response to the summons. Petitioner failed, however, to identify all of Eagle's customers. Using additional information garnered from Eagle's bank, on March 30, 1998, the IRS filed an additional set of levies. Gov't C.A. Br. 5-6.

In the interim, petitioner had already created her next entity, E.S.S. Co., Inc. (E.S.S.). On October 1, 1997, the same day she received a copy of the IRS summons, petitioner filled out an application for a New Jersey business certificate for E.S.S. Following the issuance of the March 30, 1998, levies to Eagle's customers, E.S.S. demanded that the customers execute a new service agreement, backdated to February 13, 1998, replacing Eagle with E.S.S. E.S.S. billed the customers a second time for work performed by Eagle during the month of March, and demanded that payment be made to

E.S.S. rather than to the IRS. Although most of E.S.S.'s letters were signed by petitioner's daughter, petitioner signed at least one of the letters herself. In addition, several documents attached to the letters were signed by petitioner, and several of the letters were accompanied by faxes or personal phone calls from petitioner demanding payment of the double bills to E.S.S. Gov't C.A. Br. 6-7.

2. A grand jury returned a superseding indictment charging petitioner with knowingly and willfully attempting to evade and defeat the payment of payroll taxes for the quarterly periods including April 1994 through April 1998, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2. Pet. App. 2a-3a. The indictment alleged that "by directing clients of Eagle Security, Inc. to pay their unpaid balances that they owed to Eagle Security, Inc. to E.S.S. Co.," petitioner attempted to evade payment to the IRS of the outstanding payroll taxes. Gov't C.A. Br. 3.

The government later filed notices of its intention to offer at trial, pursuant to Federal Rule of Evidence 404(b), evidence of other acts committed by petitioner. The government indicated that it intended to offer, among other evidence, proof that Quest, like Eagle, accumulated a large payroll tax debt and went out of business in order to avoid payment, as well as proof that petitioner had not filed personal or corporate tax returns. The government proposed to offer that evidence in order to show that petitioner's failure to pay the Eagle debt was done with knowledge of the law and intent to avoid paying taxes. Gov't C.A. Br. 3-4. The district court admitted the evidence over petitioner's objection, and instructed the jury to consider it only in determin-

ing petitioner's intent, motive, willfulness, and absence of mistake. Pet. App. 5a-6a, 9a.

The jury found petitioner guilty. The district court sentenced her to 41 months of imprisonment, to be followed by three years of supervised release. Pet. App. 9a.

3. On appeal, petitioner argued that evidence of her other tax violations was inadmissible because she had not disputed intent. See Pet. App. 19a; Pet. C.A. Br. 29-37. The court of appeals affirmed. Pet. App. 1a-25a. It explained that evidence of other bad acts is admissible if: (i) it has a proper purpose, such as proving intent; (ii) it is relevant; (iii) its probative value outweighs its potential for unfair prejudice; and (iv) the court instructs the jury to consider the evidence only for proper purposes. *Id.* at 20a-21a. "To demonstrate a proper purpose," the court explained, "the government must 'proffer a logical chain of inference consistent with its theory of the case.'" *Id.* at 20a (quoting *United States* v. *Sampson*, 980 F.2d 883, 888 (3d Cir. 1992)). The court relied on numerous cases holding that "a defendant's past tax-paying record is admissible to prove willfulness circumstantially." *Id.* at 22a (quoting *United States* v. *Bok*, 156 F.3d 157, 165-166 (2d Cir. 1988)); see *id.* at 21a-22a.

Rejecting petitioner's argument that intent was not an issue at trial, the court of appeals explained that "the district court stated that [petitioner] squarely had raised the issue of intent," and "we do not see how it could have reached a different conclusion" on the record in this case. Pet. App. 24a.

ARGUMENT

Petitioner contends (Pet. 5-29) that the district court's admission of evidence concerning her other tax

violations was improper. That factbound decision does not warrant further review.

1. a. Under Federal Rule of Evidence 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent * * * or absence of mistake or accident." To be admissible under Rule 404(b), evidence must (i) be offered for a proper purpose, (ii) be relevant, (iii) have probative value outweighing its potential for unfair prejudice, and (iv) be offered with an instruction that the jury should consider the evidence only for its proper purposes. *Huddleston* v. *United States*, 485 U.S. 681, 691-692 (1988).

In order to prove that a tax evasion was willful, the government must show that the defendant's conduct was a "voluntary, *intentional* violation of a *known* legal duty." *Cheek* v. *United States*, 498 U.S. 192, 201 (1991) (quoting *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam)) (emphases added). Previous efforts to escape tax obligations imply both knowledge of the law and willingness to defy it. See, *e.g.*, *Holland* v. *United States*, 348 U.S. 121, 139 (1954) (holding that willfulness can be inferred from "a consistent pattern of underreporting"). Thus, every circuit that has addressed the issue has agreed that evidence of other tax violations is relevant to willfulness. See *United States* v. *Aboud*, 438 F.3d 554, 581-582 (6th Cir. 2006), cert. denied, No. 06-348 (Oct. 16, 2006); *United States* v. *Scholl*, 166 F.3d 964, 976 (9th Cir.), cert. denied, 528 U.S. 873 (1999); *United States* v. *Bok*, 156 F.3d 157, 165 (2d Cir. 1998); *United States* v. *Zizzo*, 120 F.3d 1338, 1355 (7th Cir.), cert. denied, 522 U.S. 998 (1997); *United States* v.

Clements, 73 F.3d 1330, 1337 (5th Cir. 1996); *United States* v. *Scott*, 37 F.3d 1564, 1582 (10th Cir. 1994), cert. denied, 513 U.S. 1100 and 514 U.S. 1008 (1995); *United States* v. *Johnson*, 893 F.2d 451, 453 (1st Cir. 1990); *United States* v. *Upton*, 799 F.2d 432, 433 (8th Cir. 1986); *United States* v. *Dixon*, 698 F.2d 445, 447 (11th Cir. 1983).

Because evidence of petitioner's prior efforts to evade paying taxes is probative of her intent to escape known tax obligations, it is admissible under Rule 404(b). Petitioner did not contest that point in the court of appeals.

b. Instead, petitioner argued below, and continues to argue here (Pet. 7), that her intent was not an issue at trial. That claim is both inconsistent with the record and legally irrelevant. In her initial opposition to the government's notice of intent to offer the Rule 404(b) evidence, petitioner averred that one of the "two major issues of dispute will be whether or not the E.S.S. Co. documents . . . were prepared in error without fraudulent intent or prepared at the direction of [petitioner] as part of the scheme alleged in the indictment." Gov't C.A. Br. 30. Petitioner's proposed jury instructions included a good-faith charge directing the jury to "consider all of the evidence received in the case bearing on [petitioner's] state of mind." *Ibid.* Petitioner also asked that the jury be charged that she could not be convicted without "the specific desire that the crime of evading the payment of taxes be accomplished," and she argued at the close of the government's case that the government had not proved that element. *Id.* at 30-31.

In her closing argument, petitioner argued that even though she told one of her clients to pay E.S.S. instead of the IRS, "she did not willfully intend * * * to have

any money diverted from Eagle that should have gone to the IRS, to E.S.S. Co." Gov't C.A. Br. 31. Moreover, one of petitioner's central contentions at trial was that she acted on the advice of counsel, so that any evasive act could not have been willful. *Ibid.*

In any event, petitioner's intent was necessarily at issue because willfulness is an element the government must prove at trial. See 26 U.S.C. 7201; *Cheek*, 498 U.S. at 201. Generally, "a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Old Chief* v. *United States*, 519 U.S. 172, 186-187 (1997); see *id.* at 186-189.

c. Even if the district court erred in admitting evidence of other failures to comply with the tax laws, any such error was harmless in light of the overwhelming evidence of petitioner's guilt, including evidence that, after failing to identify all of her customers in response to the IRS summons, she had double bills sent to her customers and demanded that they pay E.S.S. and not the IRS. See Gov't C.A. Br. 24-28, 33-34; pp. 2-3, *supra*.

2. Petitioner also argues (Pet. 5-11) that her other tax violations are not sufficiently similar to the tax evasion at issue here to be probative of her intent, and that the court of appeals applied an incorrect standard in deciding that question. That challenge, which was not raised in the court of appeals, lacks merit.

As discussed, evidence that petitioner has repeatedly attempted to evade the payment of taxe—such as by closing businesses and re-opening them under new names, and failing even to file tax return—is highly probative of her intent to evade the tax laws. As petitioner conceded in the court of appeals, that evidence led the jury "to believe that [she] was a tax *evader*," not a good-

faith violator of the tax laws. Pet. C.A. Br. 30 (emphasis added).

Although petitioner argues (Pet. 9-11) that the courts of appeals use different tests to describe the required level of similarity, any semantic differences in formulation do not appear to differ in substance, much less to produce different results in different cases. For example, petitioner argues (Pet. 6-7) that the Third Circuit uses two different formulations, one of which requires that "the evidence offered must cast light upon the defendant's intent to commit the crime," *United States* v. *Himmelwright*, 42 F.3d 777, 782 (1994), while the other requires the government to "clearly articulate how that evidence fits into a chain of logical inferences" showing that the evidence is proffered for a legitimate purpose. *United States* v. *Sampson*, 980 F.2d 883, 887 (1992). There is no difference between those two formulations, as shown by *Himmelwright*'s invocation of both. See 42 F.3d at 782. The first formulation says that the evidence must be relevant to intent (or some other permissible purpose), while the second says that the government must show *how* the evidence is relevant to intent or some other permissible purpose.

Differences in the formulations used by other courts of appeals either are purely semantic or responsive to differences in the facts of each case. That is shown in part by petitioner's implausible assertion (Pet. 7, 9, 10-11) that multiple standards are used *within* at least six different circuits—the First, Second, Third, Sixth, Seventh, and Eighth. Petitioner essentially claims to have identified (Pet. 9-11) two different tests: similarity and intent tests. But petitioner herself asserts (Pet. 10-11) that the similarity test is "qualified" by an intent test, confirming that there is no actual difference between the

two. Indeed, petitioner does not even argue, much less demonstrate, that applying one of the formulations instead of another would change the result in this *or any other* case. As discussed, every circuit to consider the question has agreed that evidence of past tax violations is admissible to show willfulness, regardless of the semantic formulation petitioner attributes to that circuit. See pp. 5-6, *supra*.*

3. Petitioner claims (Pet. 14-24) that Rule 404(b) violates due process and double jeopardy principles. Because that contention was neither pressed nor passed upon below, this Court should not consider it. See *Davis* v. *United States*, 495 U.S. 472, 489 (1990).

In any event, this Court has already held that Rule 404(b) does not violate the due process or double jeopardy guarantees. *Dowling* v. *United States*, 493 U.S. 342, 352-354 (1990). The Court explained that evidence of prior acts is not inherently unreliable, and that the jury "remain[s] free to assess the truthfulness and significance" of such evidence. *Id.* at 353. Any potential for

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* Petitioner complains (Pet. 6-7, 11-13) that the district court erred in instructing the jury that it could consider the evidence not only for intent, but also for motive and absence of mistake or accident. Because that objection to the jury instruction (as opposed to the admission of the evidence) was neither pressed nor passed upon below, this Court should not consider it. See *Davis* v. *United States*, 495 U.S. 472, 489 (1990). In any event, petitioner correctly concedes (Pet. 12) that such an instruction "is not impermissible" because intent, motive, and absence of mistake or accident are all legitimate purposes for admitting and considering evidence under Rule 404(b). Like intent, motive and absence of mistake were at issue in this case because petitioner testified that although she had in effect directed one of her customers to circumvent the IRS's lien, she had done so inadvertently. Gov't C.A. Br. 30 n.5. In any event, the instruction could not have prejudiced the jury, and it certainly was not plain error.

unfair prejudice can be addressed by excluding especially prejudicial evidence under Federal Rule of Evidence 403 and instructing the jury to consider prior acts only for proper purposes. *Ibid.* Because *Dowling* involved evidence of criminal conduct of which the defendant had previously been *acquitted*, that conclusion applies *a fortiori* to the prior acts of tax evasion at issue here. See *id.* at 353-354. The petition cites only Justice Brennan's dissent in *Dowling*, not the opinion of the Court. See Pet. 14 n.24, 20-21 n.34.

Petitioner argues (Pet. 19) that the admission of other-acts evidence deprives defendants of notice of the charges against them. But petitioner is not on trial for other acts, only for those charged in the indictment. See *United States* v. *Felix*, 503 U.S. 378, 387 (1992). And Rule 404(b) complies with any constitutional notice requirement by providing that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed. R. Evid. 404(b). Although petitioner contends (Pet. 19) that the rule "is constitutionally defective in not requiring notice whether requested or not," petitioner identifies no basis for that assertion. In any event, the government notified petitioner of its intent to offer evidence of her prior acts in this case. Gov't C.A. Br. 3.

4. Petitioner's final contention (Pet. 24-28) is that this Court should overturn its unanimous decision in *Huddleston*, which holds that "a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a)." 485 U.S. at 689. Instead, "'similar act'

and other Rule 404(b) evidence * * * should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act." *Id.* at 685.

Although petitioner now proposes (Pet. 27) a range of other procedural safeguards, those contentions were neither pressed nor passed upon below, and should not be considered by this Court. See *Davis*, 495 U.S. at 489. Nor would additional protections have made a difference in this case, because the evidence of petitioner's prior acts was overwhelming. See pp. 2-3, *supra*. Indeed, petitioner conceded in the court of appeals that "there was no lack of evidence against" her concerning the prior acts. Pet. C.A. Br. 30.

Even if the issue were properly presented in this case, there would be no reason to revisit this Court's unanimous *Huddleston* decision. As *Huddleston* explains, appropriate

> protection against * * * unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402 * * *; third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

485 U.S. at 691-692 (citations and footnote omitted). Petitioner's observation (Pet. 27) that "judicial economy dictates that we avoid 'mini-trials'" only underscores the wisdom of not requiring judges (much less juries in bifurcated trials, see *ibid.*) to make preliminary findings concerning the reliability of evidence of prior acts admitted for proper purposes under Rule 404(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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